Supreme Court, U.S.
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No.

In The
Supreme Court Of The United States

GEORGE A. MAYES,
Petitioner,
v.
LOCAL 106, INTERNATIONAL UNION OF OPERATING ENGINEERS, JANE M. LABARGE,(former) Office Manager, WILLARD J. LABARGE,(former) Business Manager, RICHARD C. KOSITZKA, (former) Treasurer, JAMES F. TOMMANEY, (former) Treasurer, JOHN J. KELLOGG, (former) President and Treasurer, FRANK LOMIO, Local 106 Coordiner, DIANE O'HARE, Office Manager, GORDON M. KILBY, Local 106 Training Fund Trustee, EUGENE HALLOCK, Local 106 Training Fund Trustee, GENE MESSERCOLA, Business Manager, ROBERT VAN DYKE, Plan Administrator, Engineers Joint Benefit Funds,
Defendants.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

GEORGE A. MAYES, *pro se*
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45 pp

QUESTIONS PRESENTED

1. Did the District Court properly adhere to this Court's holding in Haines v. Kerner, in dismissing pro se Petitioner's case under FRCP 56, where the District Court had denied all discovery in the six years of case litigation ?

2 Was the District Court's dismissal of pro se Petitioner's case under FRCP 56, clearly erroneous where prima facia record evidence of Pension Funds Report Forms, before said Court documented the intent to violate the Labor Management Reporting Act, 29 U.S.C. Section 501(c) ?

3. Were the District Court's findings clearly erroneous that Petitioner was an employee of Local 106 Union under the premise of Korzen v, Local Union 705, International Union of Teamsters, 75 F.2d 285,288(7th Cir.1996, and as an employee could not sue Union ,where in fact, Petitioner had not been on Union payroll since September 1980 ?

4. Did the District Court's finding that Petitioner's failure to comply with LMRDA, 29 U.S.C. Section 501(b) was fatal to his case, where Petitioner has clearly admitted in his Complaint and his Amended Complaint, that he had not done so, because it would be futile to ask the very officers who were committing the violations to sue themselves, and where other Circuit Courts and this Court have held to the contrary ?

5. Did the Second Circuit Court's Dismissal of Petitioner's Appeal No. 99-7283 on November 18, 1999, constitute

a finding that upheld improperly the District Court's rulings cited in 1 through 4, above, and it was therefore clearly erroneous, as to those facts ?

6. Did the Second Circuit Court's holding and therefore it's Dismissal of Petitioner's Appeal No. 99-7283 on November 18, 1999, correctly hold, that Petitioner Mayes "had neither plead nor alleged that Respondents RICO violations were continuing and ongoing", where Petitioner-Plaintiff Mayes's Complaint, Amended Complaint and Affidavit, had clearly so pled and/or alleged more than twenty instances in said records before the Court ?

7. Was the Second Circuit Court's dismissal (Feb 18, 2000), of Petitioner-Appellant Mayes' Appeal of Judge McCurn's Memorandum-Decision and Order of February 5, 1999, in conflict with decisions of the Third Circuit, Fifth Circuit , Seventh Circuit, and Ninth Circuit Courts, based on the LMRDA, 29 U.S.C. Section 501(b) ?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion on Petitioner's Appeal to the United States court of appeals, dated November 18, 1999, is at Appendix B to the petition and is unpublished.

The opinion on Petitioner's Petition for Rehearing En Banc to the United States Second Circuit Court of Appeals, dated February 15, 2000, is at Appendix C to the petition and is unpublished.

The opinion of the United States district Court, dated February 5, 1999, appears at Appendix A to the petition and is reported at WL 60135.

JURISDICTION

The date on which the United States Court of Appeals decided my case Appeal 99-7283, was November 18, 1999.

A timely petition for rehearing En Banc was denied by the United States Court of Appeals on February 15, 2000, and a copy of the order denying rehearing appears at Appendix C. The Second Circuit Court denial for a rehearing en banc was dismissed on the same date and in the same document.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. Sections 2, 371, 1027, and 1341

18 U.S.C. Section 1964(c)

Section 301 of the Labor Management Relations Act of 1974 ("LMRA"), 29 U.S.C. Sections 185-186

Civil Practice Laws and Rules ("CPLR") Section 213(2)

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sections 1101, 1104, and 1132

Fair Labor Standards Act ("FLSA"), 29 U.S.C. Sections 201-219

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Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. Sections 411, 412, 501(a) 501(b), 501(c) and 529

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United States Constitution Article III Racketeering Influence and Corrupt Organizations Act ("RICO"), 18 U.S.C. Sections 1961-1968

Taft-Hartley Act 29 U.S.C. Section 157 (SIC.)

STATEMENT OF THE CASE

Petitioner sets forth a petition for Writ of Certiorari based upon the District Court's dismissal of this pro se petitioner-plaintiff's Civil RICO case against Local 106 International Union of Operating Engineers Civil No. 93-CV-716 on February 5, 1999, and the dismissal of the United States Court of Appeals for the Second Circuit dismissal Appeal No. 99-7283 dated November 18, 1999, based upon the primary holdings of the District Court.

Petitioner filed a Petition for Rehearing En Banc that was decided and denied on February 15, 2000. Said Decision also noted that said Petition for Rehearing En Banc had been transmitted to the judges for the court in regular active service, and to any other judge that heard the appeal, and that no such judge had requested that a vote be taken thereon.

Petitioner submits that the questions of law that pertain to both the United States District Court's dismissal and the United States Circuit Court dismissal are reviewable under Supreme Court Rule 10(a) which, in part, states, (1). "A United States court of appeals has entered a decision in conflict with a decision of another United States court of appeals on the same important matter;. . ."

Petitioner additionally asks certiorari review based upon

said Rule 10(c) in that;(2) ". . . Or a United States court of appeals has decided an important question of federal law that has not been but should be settled by this court, . . ." Namely, the LMRDA, 29 U.S.C. Section 501(b).

Additionally, petitioner addresses said writ of certiorari to Rule 10(c) which in part states; 3. ". . .Or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Namely, Haines v. Kerner, among others.

Petitioner-plaintiff Mayes has been, and still is, a member in good standing of Local 106 International Union of Operating Engineers, AFL CIO, for more than forty-five (45) years. Petitioner-plaintiff filed Civil No. 86-CV-41, due to alleged job discrimination by an insurgent group referred to as "the LaBarge Group" who took control of Local 106 Union in September, 1980. Petitioner Mayes had served a brief appointment as business agent for said Union just prior to the Union takeover by said LaBarge Group. Petitioner has claimed a personal vendetta by the head of said LaBarge Group, Respondent-defendant Willard J. LaBarge, who became business manager for Local 106 in September of 1980. He immediately fired petitioner Mayes from his temporary position as business agent. Said case Civil No. 86-CV-41 was dismissed after a 7-day trial because petitioner Mayes as a *pro se,* had failed to submit into evidence the relevant collective bargaining agreements that Local 106 was signatory to. Therefore, even though petitioner Mayes had submitted records proving his case of job discrimination, his failure to submit into trial evidence, the Collective Bargaining Agreements that Local 106 Union was signatory to, left the Court without the necessary access to the authority of the collective bargaining agreements to rule upon the

alleged job discrimination, in Civil No. 86-CV-41. It was dismissed by Judge McCurn for failure of Petitioner-Plaintiff Mayes, to prove his case.

In the process of discovery for Civil No. 86-CV-41 petitioner Mayes obtained the microfilms of the contractor's payments into the Engineers Joint Pension Fund based in Syracuse, New York, from 1979 to 1986. Said microfilm records showed every penny paid into said Union Pension Fund for several unions constituting the Engineers Joint Pension Fund. Petitioner's review of these microfilm pension records disclosed that the officers and office staff of Local 106 Union were stealing funds from the Union treasury by a simple payroll procedure. The procedure that was used in compiling and submitting on Pension Report Forms which were sent through the United States Postal Service to said Engineers Joint Pension Fund in Syracuse, New York. Such transmittal of stolen funds through the United States Postal Service is prima facie evidence of a violation of a federal statute.

These forms that were used by all contractors who had collective bargaining agreements with Local Union(s) 17, 106, 410, 463, 545 and 832 and were prepared and furnished by the Engineers Joint Benefit Funds, so that the contributions required to be paid by each contractor under the specific collective bargaining agreements, in effect at that date, which therein specified the amount of contribution rate allowed to be paid per hour for each Union employee.

The Officers and office staff of Local 106 Union were allowed to contribute into these same Pension Funds, under the Employee Retirement Income Security Act (ERISA),by a Non-

Bargaining Participating Agreement between Local 106 Union and the Engineers Joint Pension Fund and the Central Pension Fund.

This Agreement was in force from 1947 and was continuing in force when this case, No.93-CV-716 was filed on June 3, 1993. Said Agreement did specify the amount that Union Officers and office staff employees could contribute, into their individual pension fund accounts. These contributions, in the form of checks drawn upon the Local 106 Union Treasury, that sent with the Pension Report Form to the Engineers Joint Benefit Funds located in Syracuse, New York. Then these moneys were then distributed to each of the specific benefit accounts identified in each collective bargaining agreement.

Petitioner Mayes has submitted into case evidence, prima facie documented proof, that beginning with a payroll period of December 1980, Respondent-Defendant, Willard J. LaBarge and the other named defendants, co-conspirators and aider/abettors, began typing over the correct amount of contribution rate that was called for under the said collective bargaining agreements, as these amounts were already printed on the pension forms. The Respondent-Defendants typed over the amount properly to be contributed and then typed in the extra higher unauthorized amount to be submitted for deposit into their individual Pension Fund accounts. These micro film records are prima facie evidence before the Courts, that should preclude dismissal of a pro se plaintiff's case under Summary Judgment.

The submitting of the overpayment, as well as the allowed payments in the form of one check drawn upon the Local 106 Union Treasury, documented acts of the alleged co-conspirators and aiders

and abettors, who were also beneficiaries of said unauthorized Pension Fund contributions. This taking of unauthorized sums from the Union Treasury continued from 1980 to the date of petitioner Mayes filing his Civil RICO action 93-CV-716 on June 3, 1993.

Petitioner-Plaintiff Mayes submits that these acts by the Respondents-Defendants did constitute and were documented as being ongoing and continuing violations thereby invoking the Second Circuit Doctrine of tolling the applicable federal statutes of limitations.

The microfilm printouts of the original Pension Report Forms, constitutes prima facie proof of the amounts that the named Respondents-Defendants were able to steal from the Local 106 Union Treasury and have contributed to their individual pension fund accounts. These records document that in the beginning the amount of contribution to the International Union pension fund located in Washington D.C., known as Central Pension Fund, was doubled from the allowable amount specified in the collective bargaining agreement. The unauthorized rate of Pension Fund contributions were, at one point in time, almost three (3) times the contribution rate specified by the applicable Collective Bargaining Agreements in effect at that date.

Beginning in 1981, Respondent-Defendant Willard J. LaBarge, under his powers as Union Business Manager, then caused the compiling and paying of claimed overtime hours into the Engineers Joint Pension Fund for himself, the officers and office staff of Local 106. Petitioner-Plaintiff has proved by the records before the District Court, that these claimed overtime hours, which were never authorized by the Local 106 Union Executive Board,

were in fact reported and said pension benefits were paid into the named Respondent-Defendants individual Pension Funds accounts. Petitioner-Plaintiff Mayes has alleged that these reported and paid overtime hours violated the Fair Labor Standards Act.

Respondent-Defendant Willard J. LaBarge has certified in his affidavits in evidence before the District Court, that no Union funds can be removed from the Union Treasury without prior authorization of the Local 106 Union Executive Board. Petitioner-Plaintiff Mayes has also so certified such approval by the Executive Board is required under the authority and powers of the Local 106 Union Constitution and Union By-Laws, but Respondents-Defendants never obtained such required authorization.

At a later time LaBarge and defendants began paying extra overtime hours into the Central Pension Fund in Washington, D.C.. Coincidentally, these unauthorized extra hours of pension benefits that were being reported as overtime, were, in fact, as alleged and documented by Petitioner-Plaintiff Mayes, violations of the Fair Labor Standards Act. These payments suddenly ceased, in approximately sixty days after Petitioner-Plaintiff Mayes filed Civil 93-CV-716, ending a practice that began in 1981, but was still ongoing and continuing when Civil No. 93-CV-716 was filed..

Petitioner-Plaintiff Mayes has proven this in the records he placed before the District Court, that the Respondent-Defendants had never properly obtained authorization, through the Local 106 Union Executive Board, as was required by the International Union of Operating Engineers Constitution and the Local 106 Union bylaws. Therefore petitioner submits that these prima facie printouts from the microfilm Pension Fund records, did document

that Local 106 Union officials have stolen well over Two Hundred Fifty Thousand Dollars ($250,000.00), and could reach one half million, if all the records were obtained by proper discovery, which the District Court had never allowed, by Court Order. Plaintiff filed his pro se complaint specifying these above stated acts in his original complaint, noting therein that many of the named defendants began receiving these unauthorized and therefore stolen funds from the Local 106 Treasury in 1981 and that these funds had been transferred into their individual pension account or accounts, as may be.

Respondent-Defendants have submitted only one primary defense to Petitioner-Plaintiff Mayes' verified Complaint filed June 3, 1993 and also, this same primary defense was alleged in their defense of Petitioner-Plaintiff Mayes' verified Amended Complaint filed July 29, 1996. This alleged and/or claimed legal premise defense, that was asserted against all thirty-three of Petitioner-Plaintiff's Causes of action was that every Cause of Action was time barred by the relevant and/or applicable statute of limitations.

The District Court's Memorandum-Decision and Order of February 5, 1999, did in most Causes of action, accept said premise as against Petitioner-Plaintiff Mayes' verified Amended Complaint. Judge McCurn's said decision, failed to review or recognize that Petitioner-Plaintiff Mayes' had properly submitted case records that prima facially documented that said Respondent-Defendant's had clearly acted to deliberately conceal from Mayes , the fact that in 1986, they had falsely claimed over their sworn to answers, that Local 106 Union did not possess said pension records. Petitioner-Plaintiff Mayes has fully and properly claimed that such proven deliberate concealment, were in case records before the District

Court, that did document their control and possession, and of these, vital Pension Records. Such proven acts do toll the relevant Federal Statute of Limitations, which should have precluded a case dismissal under Fed. R. Civ. P. 56, as Judge McCurn did on February 5, 1999.

Petitioner-Plaintiff Mayes erred in believing that his full admission as stated in his original complaint and again in his verified Amended Complaint, that he did not ask the officers of Local 106 to sue themselves under the Labor Management Reporting and Disclosure Act, 29 U.S.C. Section 501(b), was sufficient as to comply with LMRDA, 29 U.S.C. Section 501(b).

This belief was founded in the Supreme Court's holding in Steele v. Louisville & Nashville Railroad Co. , (1944), that such a request to sue was not always necessary. This fact was also clearly stated in petitioner Mayes' amended complaint filed in Civil No. 93-CV-716 on July 29, 1996.

The Second Circuit Court's Summary Order of November 18, 1999, held that Petitioner-Plaintiff Mayes, had neither pled or alleged that the alleged acts of the Respondent-Defendants were as being continuing and ongoing violations, until he did so in his Appeal No. 99-7283. The Second Circuit Court Holding should be considered as clearly erroneous

The defendants, under Rule 26(b) obtained an order on October 7, 1993, from District Court Magistrate, Ralph W. Smith, denying plaintiff Mayes any discovery in Civil No. 93-CV-716. Therefore, petitioner Mayes' Civil RICO case was dismissed by the District Court when no discovery had been allowed and this was

also upheld by the Second Circuit Court in their dismissal by Summary Order of November 18, 1999.

The Second Circuit Court of Appeals denied Petitioner-Plaintiff Mayes' Petition for ReArgument En Banc without any consideration of the entire Circuit Court panel. It was summarily denied by the same three-judge panel as its prior Decision of November 18, 1999. This new Summary Order was dated February 15, 2000.

ARGUMENT

Petitoner-Plaintiff Mayes submits a claim that Judge McCurn's Memorandum, Decision and Order of February 5, 1999, failed to properly consider records submitted to that Court in that Petitioner-Plaintiff Mayes had filed his original complaint as a pro se on June 3, 1993, and had also filed his amended complaint on July 29,1996, as a pro se. The District Court had thereby totally ignored the United States Supreme Court decisions as set forth in Haines v. Kerner and Boag v. McDougal in regards to the fact that the Court denied Petitioner-Plaintiff Mayes even a scintilla of discovery in six years of case litigation. **(See Appendix D, pages 49 through 53, i.e. "Point I" of Petitioner-Plaintiff Mayes' Appeal to Second Circuit Court.)**

Petitioner submits that Judge McCurn's dismissal under Rule 56, Summary Judgment, where Petitioner-Plaintiff has submitted prima facie documents that Respondent-Defendant, Willard J. LaBarge, had intentionally caused funds to be withdrawn from the Union Treasury without authorization and by a simple payroll procedure, have those funds transferred through the United

States Postal Service to his personal pension account. The case records before the District Court document the fact that in the one and only one record document submitted into the case records, where Respondent-Defendant LaBarge's stated a claim that the required approval by the Local 106 Union Executive Board, for an increase in Pension Fund rate of contributions, was properly granted on October 10, 1983. This only document of an approval by said Executive Board, was proven to be null and void under the premise of the Second Circuit's holding in United States v. Butler, 954 F.2d 114, (1992), where an official had concealed facts from the authorizing body, therefore the authorizing act became a nullity.

In this case Respondent-Defendant LaBarge got an approval for a twenty-five ($.25) increase in the rate of pension fund contributions, as being in lieu of a wage increase. LaBarge had withheld from the Union Executive Board the fact that he had already increased that rate in 1980, had already increased the hours per week being paid and in September 1981, had already given himself and the office staff a 10 percent salary raise, without the Union Executive Board's required approval. Therefore, the claimed authorization of October10, 1983, was a nullity. That it was the only claimed pension benefit raise claimed to be approved in six (6) years of this case's litigation, but as such was proven to be a nullity. These records before the District Court document the fact that Respondent-Defendant Willard J. LaBarge, by his documented act of October 10, 1953, fully intended to defraud the Local 106 Union. **See APPENDIX D, POINT V, Crimes Under the Racketeering In Corrupt Organizations Act, U.S.C. Sec. 1961. et seq, Are Actionable Civil RICO, Sec. 1962, et seq., pages 63-75.**

Petitioner-Plaintiff Mayes has documented in the records already before the District Court these intentional acts by Respondent-Defendants. Therefore, the intent alleged and presumed to be proven, without discovery, is sufficient to preclude a Summary Judgment dismissal against Petitioner-Plaintiff Mayes. **(See Appendix D, pages 80-83, "Point VIII" of Petitioner-Plaintiff Mayes' Appeal to the Second Circuit.)**

Part of Judge McCurn's dismissal was erroneously based upon that Court's findings that Petitioner-Plaintiff Mayes was, in fact, an employee of Local 106 Union. The facts are, and have been proven in the documents before the Court, that Petitioner-Plaintiff Mayes has not been an employee of Local 106 Union since September, 1980. Therefore, Judge McCurn's reliance upon Korzen v. Local Union 705, International Brotherhood of Teamsters, 75 F3d 285, 288 (7th Cir. 1996) (citing Kunz v. United Food & Commercial Workers, 5 F3d 106, 109 (6th Cir. 1993), should be viewed by this Court as being clearly erroneous. **(See Appendix A, pages 28 and 29.)**

Judge McCurn's review and findings pertaining to Petitioner-Plaintiff Mayes' claim of loss of opportunity to work on 150 (One Hundred Fifty) job assignments was addressed by the Court, pages 12, 13 of his MDO of February 5, 1999. Judge McCurn's findings did not state that Petitioner-Plaintiff Mayes' claim of said loss of job opportunities had no merit. The Court noted that the time element went back to 1980 and therefore indicated as being time barred, without considering the Second Circuit's doctrine of tolling, where a violation was continuing and ongoing, as was alleged by Petitioner-Plaintiff Mayes. The Second Circuit's Summary Order of November 18, 1999, erroneously held,

"As to Appellant's claims under the Taft-Hartley Act, 29 U.S.C. Sec. 157, (SIC.) the District Court dismissed them without discussion, concluding they had no merit." Petitioner-Plaintiff Mayes asks the Supreme Court to review and consider said finding of the Second Circuit Court as being clearly erroneous and not applicable as to the findings of Judge McCurn's MDO of February 5, 1999. **(See Appendix B, page 34.)**

Petitioner-Plaintiff Mayes had submitted in his Appeal 99-7283, that the Second Circuit Court's decision of November 18, 1999, had held: "We reject appellant's contention on appeal that some of his time-barred claims can be resurrected based on a 'continuing violation' theory. Appellant neither pled nor alleged prior to this appeal that these claims were 'ongoing violations'." Petitioner-Plaintiff Mayes requests the Supreme Court to consider said findings and holding by the Second Circuit Court as being clearly erroneous where, in fact, Petitioner-Plaintiff Mayes had cited perhaps more than twenty instances of his claim that said Respondent-Defendants acts were continuing and ongoing. **(See Appendix D, pages 58, 59 "Point III".)**

Petitioner-Plaintiff Mayes therefore asks that this Court consider each and every finding by either Judge McCurn's MDO of February 5, 1999, or the Second Circuit Court's Summary Order of November 18, 1999, as being clearly erroneous as to each such finding that Petitioner-Plaintiff Mayes had failed in proving that the alleged acts were within said applicable statute of limitations. Petitioner-Plaintiff Mayes submits under Rule 10(a), as to a condition governing review of Certiorari, as said section states, "A United States Court of Appeals has entered a decision in conflict with a decision of another United States Court of Appeals on the

same important matter; . . ." The Second Circuit Summary Order decision of November 18, 1999, held that, "We also reject Appellant's argument concerning futility with respect to his claim pursuant to Section 501(b) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. Section 501(b). See Coleman v. Bhd. of Ry. and SP Clerks, 340 F2d 206, 208 (2nd Cir. 1965). (Request requirement is "mandatory and . . . cannot be met by anything short of an actual request [to sue] . . . . [and a] an allegation of the futility of such a request will not suffice."); See also Dinko v. Wall, 531 F2d 68, 72-73 (2nd Cir. 1976) (Reiterating Coleman holding).

Petitioner-Plaintiff Mayes submits there are at least, several other United States courts that have held contrary to the above-cited Second Circuit Summary Order. The 5th Circuit Court in Calaqaz v. Calhoon, 309 F2d 248 (5th Cir. 1962) noted that, "Defendant's contend that the complaint should be dismissed because the Plaintiff did not exhaust his internal remedies within the Union. The Plaintiff, however, alleged in his complaint that action to obtain relief through Union procedures would be 'futile' because the individuals who were named as defendants and whose actions the plaintiff complains of are officers of National and are in control of all channels of relief the plaintiff might have in the union. See Finger v. Seaboard Airline Railroad Co. 5th Cir. 1960 277 F2d, 698, 701. The plaintiffs are not compelled to exhaust the internal remedies of their union when their appeal would have been made to the very same officers against whom their complaint is directed. Steele v. Louisville and Nashville Railroad Co., 1944, 323 U.S. 192, 65 S. Ct. 226, 89 L.Ed.2d 173." **(See Appendix D, "Point IV", pages 60 and 61.)**

Petitioner-Plaintiff Mayes also stated under oath at the close of the above-quoted text that, "Mayes submits that he did rely in good faith, upon the United States Supreme Court decision in Steele when he filed his complaint and his amended complaint." The review by the Second Circuit Court totally dismissed Petitioner-Plaintiff Mayes' claim, with out recourse.

Additionally, the 3rd Circuit in Sabolsky v. Budzanoski, 457 F2d 1245, noted; "It has been held that a lack of formality in observing the procedures of Section 501(b) will not bar a court from granting leave, where appropriate. Executive Board, Local Union No. 28 v. I.B.E.W., as the court has said in Horner v. Ferron, n26 362 F2d 224 (9th Cir. 1966), "The allegations of the verified complaint may be sufficient to enable the court to determine where there is 'good cause'. The Court in Sabolsky also noted, "We held in Purcel v. Keen, 406 F2d 1195, 1969, that there is no mandatory exhaustion of internal remedies requirement in suits under Section 501 of the LMRDA. We also stated that efforts to evoke internal remedies of the Union may affect the 'good cause' requirement of Section 501(b) under certain circumstances." (**See Appendix D, "Point IV", page 61.**)

Petitioner-Plaintiff Mayes submits that the 7th Circuit in McNamara v. Johnston, 522 F2d 1157 (1975) noted; "We have recognized the similarity between a Section 501 action and a shareholder's derivative suit and have noted that, as in the case of a derivative suit, a demand is not always necessary. Hood v. Journeymen Barbers, Hairdressers, etc., 454 F2d 1347, 1354, n.23 (7th Cir. 1972). (**See Appendix D, "Point IV", page 61.**)

Petitioner-Plaintiff Mayes submits that the 5th Circuit Court

in Adams-Lundy v. Association of Professional Flight Attendants, 844 F2d 245 (1988) noted that; "We agree with the 2nd Circuit that in determining whether a request for legal action was made, we must keep in mind that 'the ACT is designed to protect union members' and that an interpretation of Section 501(b) requires a balancing of policies. n24" **(See Appendix D, "Point IV", page 62.)**

Petitioner-Plaintiff Mayes submits that the 2nd Circuit in a more recent case has again stated this position on 29 U.S.C. Section 501(b) in Dunlop-McCulland v. Local IS, 149 F3d 85 (2nd Cir. 1998) where it noted; "This court has found that the 'good cause' required for leave to sue under Section 501(b) serves two policies '[1] supervision of union officials in the exercise of the fiduciary obligations and [2] protection, through a preliminary screening mechanism, of the internal operation of unions against unjustified interference or harassment'. Dinko v. Wall, 531F2d 68, 75 (2nd Cir. 1976) Accordingly we have construed 'good cause' in Section 501(b) 'to mean that plaintiff must show a reasonable likelihood of success, and, with regard to any material fact he alleges, must have reasonable ground for belief in their existence. Id." **(See Appendix D, "Point IV", page 62.)**

Petitioner-Plaintiff Mayes has additionally submitted, under oath, the following claims: "Mayes submits a belief that his verified amended complaint and affidavit of May 14, 1999, with attached exhibits, fully meets said 'good cause' requirement and also meets the Supreme Court holding in Steele." **(See Appendix D, "Point IV", page 62.)**

Petitioner-Plaintiff Mayes wishes to submit a decision of

the United States Supreme Court in Ruben v. United States, 449 U.S. 424, 101 S. Ct. 698, 24 L.Ed.2d 633,49 U.S.L.W. 4103 (January 21, 1981) the Supreme Court noted; "When we find the terms of a statute unambiguous, judicial inquiry is complete, except 'in rare and exceptional circumstances.' TBA v. Hill, 437 U.S. 153, 187, n.33 1978. Quoting Crooks v. Harrelson, 282 U.S. 55, 60 (1930)) Accords Aaron v. SE, 446 U.S. 680, 695 (1980); Ernst & Ernst v. Hochfelder, (supra), at 214, n.33 . . .".

Petitioner-Plaintiff Mayes requests this Writ of Certiorari to fully consider the cases and circumstances cited above as being sufficient to grant this petition under the Supreme Court's Rule 10(a). The Second Circuit Court Summary Order directly conflicts with the above-cited other United States Circuit Courts and a premise that this petitioner claims that his case presents, "a rare and exceptional circumstance to be fully considered within a decision of the United States Supreme Court." The dismissal without discovery by Judge McCurn's Memorandum, Decision and Order of February 5, 1999, without allowing Petitioner even a scintilla of discovery should be considered as clearly erroneous or even perhaps as an abuse of discretion, where Petitioner has placed prima facie documents in the records before the United States District Court and the United States Second Circuit Court that document the unauthorized stealing of hundreds of thousands of dollars from the Local 106 Union Treasury. If this Court does not reverse and remand this case back to the United States District Court to at least allow Petitioner-Plaintiff Mayes to proceed under the Labor Management Reporting and Disclosure Act, 29 U.S.C. Section 501 so as to allow Petitioner-Plaintiff Mayes to properly proceed under the requirements of said Section 501(b), then the prima facie documented acts of the main respondents that are proven in the

records before the District Court and the 2nd Circuit Court, of the stealing of almost a half million dollars of Local 106 Union funds, will go completely unpunished, thereby creating a gross miscarriage of justice.

Petitioner-Plaintiff Mayes submits, in the alternative, and in the interest of justice, that this Court find sufficient proof to document the serious allegations set forth in his verified amended complaint, and that they are sufficient to support a Supreme Court decision remanding Petitioner-Plaintiff Mayes' case back to the District Court. Petitioner-Plaintiff asks that this Court so find and allow Petitioner-Plaintiff Mayes to proceed with discovery process in preparation for a trial by jury.

Petitioner-Plaintiff Mayes next addresses Rule 10(c) as to; "or a United States Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court." The 2nd Circuit Summary Order of 11/18/99, in holding that; "We affirm for substantially the reasons stated by the District Court. See Mayes v. Local 106, 93-CV-716, 1999 WL 60135, at *1-10 (N.D.N.Y. Feb. 5, 1999)." The above holding by the 2nd Circuit Court totally defies the findings by the United States Supreme Court in: Allen v. Wright, 468 U.S. 737, 104 S. Ct. 3315, 83 L.Ed.2d 556, 52 U.S.L.W. 5110 (1984), Warth v. Seldin,,supra at 498; 422 U.S. 490, 498 (1975). The United States Supreme Court has steadfastly held that complaints filed by pro se litigants should not be dismissed where there has been no discovery. In Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L.Ed.2d 652, the court had noted; "We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards from formal pleadings drafted by lawyers, it appears

'beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief,' Conley v. Gibson, 355 U.S. 41, 45-46 (1957). See Diocrudi v. During, 139 F2d 774 Court of Appeals (1944). Also noted, "Accordingly, although we intimate no view whatever on the merits of the petitioner's allegations, we conclude that he is entitled to an opportunity to offer proof." The Supreme Court also noted that; "Construing petitioners inartful pleading liberally, as Haines v. Kerner, 404 U.S. 519 (1972), instructs federal courts to do in pro se actions . . ." Boaq v. Macdougal, 454 U.S. 364, 102 S. Ct. 700, 70 L.Ed.2d 551 (1982). **(See Appendix D, "Point I", pages 49-53.)**

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REASONS FOR GRANTING THE PETITION

Petitioner-Plaintiff Mayes submits to the Court that as a person acting as pro se, that he has neither a legal education, nor even a high school education. His beliefs are based on his efforts to obtain records and the truth that these records may establish before the relevant Courts, and to reasonably present this information to the Court for due consideration. Representation of Petitioner-Plaintiff Mayes was obtained by some Union Members and family, for the summary judgment proceedings. This was the best that could be afforded under the circumstances, but as will be noted in the case records, that counsel did submit affidavits of Mayes that listed attached exhibits as being by alphabetical letters, not numbers, as a plaintiff's exhibits should be denoted. At all other times, Petitioner-Plaintiff Mayes acted pro se, and asks this Court to judge him accordingly.

Petitioner-Plaintiff Mayes submits for this Court's consideration, the fact that the District Court did not find his verified Amended Complaint, containing over 600 pages, had failed to meet Federal Rule of Civil Procedure, Rule 9(b), as to the required specificity

The District Court's dismissal under Summary Judgment Federal Rule of Civil Procedure, Rule 56 by Judge McCurn on Feb. 5, 1999, where the District Court had denied Petitioner-Plaintiff Mayes even a scintilla of discovery by Order of Magistrate Ralph W. Smith on March 18, 1992, and the 2nd Circuit Court's Summary Order of November 18, 1999, upholding Judge McCurn's decision, should be considered by this Court as clearly erroneous as it violates this Court's premise under Haines v. Kerner.

The 2nd Circuit Court's holding that Petitioner-Plaintiff Mayes' failure to request Local 106 Union officers to sue themselves to recover the money that these officers were allegedly stealing from the Union Treasury and/or petitioning the District Court for a right to sue under the LMRDA U.S. 29 Section 501(b) as being totally sufficient to uphold the District Court's dismissal of Petitioner-Plaintiff Mayes' case, without recourse, should be viewed by the Supreme Court under the premise of being clearly erroneous.

CONCLUSION

Petitioner-Plaintiff Mayes filed his original Complaint as a pro se party on June 3, 1993 and his verified Amended Complaint on July 29, 1996, as a pro se party. In over six years of case litigation, the District Court by Order of Magistrate Judge, Ralph W. Smith's Order of October 7,1993, denied this pro se Plaintiff even a scintilla of discovery. Dismissal under Summary Judgement of a pro se Plaintiff's case, where no discovery has been allowed by the Court is in contradiction of the holdings of the United States Supreme Court.

Petitioner-Plaintiff Mayes submits that the Memorandum-Decision and Order of Senior Judge Neal P. McCurn of February 5, 1999, dismissing the entire thirty-three Causes of Action under the premise of the Federal Rules of Civil Procedure, Rule 56, was clearly erroneous, where the records and documents already before the Court, identified serious material fact questions, albeit even without discovery, and asks this Court to so find.

Judge McCurn's Memorandum-Decision and Order held that Petitioner could not sue Local 106 Union, because he was an

employee of said Union under the legal premise of a Sixth Circuit case, Korzen, where in fact Petitioner-Plaintiff Mayes had not been an employee of Local 106, International Union Of Operating Engineers, since September 1980. Therefore, said District Court holding is clearly erroneous, and Petitioner asks this Court to so find.

Judge McCurn's Memorandum-Decision and Order also held that Petitioner-Plaintiff's failure under LMRDA, Section 501(b), to ask the Union Officers to sue or to petition the Court for a permission to sue, was totally fatal to Petitioner's case, without recourse. Petitioner-Plaintiff Mayes had clearly admitted he had not done so because, in good faith, he believed this Supreme Court had so held in Steele. Petitioner asks this Court to so find.

The Second Circuit Court's Summary Order of November 18, 1999, in essence agreed with Judge McCurn's MDO of February 5, 1999, which Petitioner-Plaintiff Mayes asks this Court to find in error. It additionally held that Petitioner had neither alleged nor pled the fact or claim that the violations as were set forth in his Verified Amended Complaint, were actually continuing and on going, so as to evoke the Second Circuit Doctrine of the tolling of the applicable statute of limitations. Petitioner-Plaintiff Mayes' original Complaint, Verified Amended complaint does contain more than twenty such allegations and/or claims, that these acts by Respondent-Defendants were continuing and ongoing from 1981 to the date this Civil No. 93-CV-716 was filed. Petitioner asks this Court to so find.

The said Summary Order, noted a question that perhaps the District Court didn't even have jurisdiction of the 150 jobs

that Petitioner had complained of, because they may have come under the National Labor Relations Board. Petitioner-Plaintiff Mayes has certified that none of these 150 job opportunities were relevant under the LMRA - Duty Of Fair Representation provisions and therefore are actionable under RICO. Petitioner requests this Court to so find.

The Second Circuit Court's Summary Order of February 15, 2000, denying Petitioner-Plaintiff's Petition For Rehearing En Banc, did in effect uphold said Circuit Court's Summary Order of November 18, 1999. As such, Petitioner requests this Court to find said Summary Order defective, as to its previous holdings under the LMRDA Section 501(b), because, as such these holdings are in conflict with several other United States Circuit Courts. Petitioner-Plaintiff Mayes requests this Court to so find.

Petitioner-Plaintiff Mayes, requests this Court, in the interest of justice, to find the various Decisions and Orders, of the Courts below are in fact in conflict with the Decisions of the United States Supreme Court and/or are in conflict with other Circuit Courts on a Federal Question, as is referenced herein, and are in sufficient error so as to provide for this Petition for a Writ of Certiorari to be granted with the provision that this Civil No. 93-CV-716 be remanded back to the United States District Court, Northern District of New York, for further proceedings consistent with this Court's findings and Order.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

George A. Mayes

Date: May. 13, 2000

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